No. 85-1214

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

GENNARO LANGELLA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether or not the Court can refuse to grant a motion to dismiss on the grounds of pre-indictment delay when actual prejudice is shown by the Petitioner to the effect that witnesses are no longer available or alive and when such refusal deprived Petitioner of due process of law.

2. Whether or not Petitioner was deprived of a fair trial by the fact that highly prejudicial matters were allowed to remain in the indictment and by litigation at the trial when Petitioner's consent and stipulation made such matters irrelevant.

3. Whether or not under federal constitutional law the trial court should have required the government to elect between a perjury count and obstruction of justice count in the indictment when both counts were essentially based upon the same facts.

4. Whether or not there was such a paucity of evidence as a matter of law that Petitioner was deprived of a fair trial.

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PRELIMINARY STATEMENT

This is an appeal by Petitioner, Gennaro Langella, from a judgment of the United States Court of Appeals for the Second Circuit, decided November 1, 1985, with an eight-page opinion, Docket No. 85-1103, which affirmed a judgment of the United States District Court for the Eastern District of New York, dated March 14, 1985, convicting him of Perjury before a Grand Jury, pursuant to Title 18, United States Code, Section 1623, and

Obstruction of Justice, pursuant to Title 18, United States Code, Section 1503. The Obstruction count rested on the same facts as the Perjury count; and Petitioner received a sentence of five years imprisonment and a fine of $10,000.00 on the Perjury count, and five years imprisonment and a fine of $5,000.00 on the Obstruction count, both sentences to be consecutive, making a total of ten years imprisonment and a fine of $15,000.00.

This case was tried to a jury in January, 1985, Hon. Henry Bramwell presiding, and appellant was represented by Gustave Newman, Esq. During all of the proceedings below and to the present time, Petitioner has been incarcerated.

An appeal to the United States Court of Appeals for the Second Circuit was taken, but the Court affirmed Petitioner's conviction by order dated November 1, 1985, a copy of which is annexed hereto.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1251. The opinion of the United States Court of Appeals for the Second Circuit is annexed hereto.

CONSTITUTIONAL PROVISIONS INVOLVED

Whether Petitioner's rights under the due process clause of the United States Constitition were violated in many regards with relation to the prejudicial delay in indicting him, the inclusion of highly inflammatory and prejudicial material in the case where materiality had been conceded and no valid basis for its introduction existed, and whether the government should have had to elect between the perjury or obstruction of justice counts in this indictment.

STATUTES INVOLVED

18 U.S.C. Section 1623 — False declarations before Grand Jury or Court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of title 28, United States Code), in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violations of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if --

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. Section 1503 Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such a juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

FACTS

Petitioner was indicted in a two-count indictment which was filed on September 7, 1984, charging him with lying to a grand jury and obstruction of justice, based upon his lies to a grand jury occurring in July and August of 1981. The indictment had been ordered up and sealed on July 3, 1984, so that the indictment occurred approximately three years after the alleged commission of the crime.

The grand jury was basically investigating a meeting which occurred on May 6, 1981 at the home of Vincent Regina at 7713 11th Avenue, Brooklyn, New York. Petitioner was alleged to have been at that meeting, and he was called before a grand jury because Carmine Persico was in the house at the same time, and the grand jury wanted to know whether Persico had been downstairs in the basement where the meeting allegedly took place, or whether he was upstairs and had had no meeting with the people who attended the meeting. In the first ten paragraphs of the indictment it was alleged that the grand jury was investigating all sorts of nefarious activities with regard to the Colombo Organized Crime Family, and a reading of those para-

graphs will clearly illustrate the prejudicial effect that such allegations could have had on the trial jury. Defense counsel made a motion with regard to dismissing Count Two of the indictment, the obstruction charge, on the grounds that it failed to charge an offense; to require the government to elect between the perjury and obstruction charge, on the grounds of duplicity; and to strike surplusage from the indictment. Counsel also, in writing, made a later motion to dismiss the indictment due to prejudicial pre-indictment delay, in violation of Petitioner's due process rights, essenially on the grounds that the evidence was complete against Petitioner in the summer of 1981, yet when the indictment was handed down, three years later, two crucial witnesses that Petitioner would have called, to wit: Vincent Regina, was then deceased, and Carmine Persico was unavailable and could not be found. The grand jury minutes of Vincent Regina which were ordered sealed by the District Court were made available the Circuit Court and can be supplied to this Court by the government when required.

Defense counsel conceded the materiality of

Petitioner's testimony before the grand jury and took the position that the only thing the trial jury would have to consider was whether or not Petitioner lied when testifying or obstructed justice. Thus, the defense contended that it was unnecessary for the trial jury to be told all of the controversial matters the grand jury was investigating, because the effect would be so prejudicial that it would deprive Petitioner of a fair trial. The defense argued that such matters were now irrelevant because materiality had been conceded but, over objection, the prosecutor was allowed to tell the jury in his opening that the grand jury had been investigating the activities of the Colombo Organized Crime Family and whether they were engaged in extortion, racketeering, murder, loansharking and narcotics trafficking (A 60)*, and whether the meeting at Regina's house was between that family and another family to carve up narcotics territories or settle leadership problems, which is exactly what the defense contended should not be done, since these issues were not relevant to the issues in the case (A 60-61).

*"A" References are to pages of the Appendix.

The Court clearly recognized the prejudicial nature of that type of evidence but did not in any way curtail the government from presenting it to the jury. For example, the Court cautioned the prosecutor and stated that his opening was more like a summation. The Court said that the opening was way off and asked the prosecutor to try to talk about specific charges rather than the entire background (A 62-63). Counsel again objected discussing all of these prejudicial matters because materiality had been conceded, but the Court overruled the objection and denied a mistrial motion. Shortly thereafter, at a side bar, the Court again gave the prosecutor its opinion that surveillance testimony and other testimony of occurrences happening before the events at the house itself were really not necessary, and although the Court doubted its relevancy, it still allowed the prosecutor to present these matters to the jury (A 64).

In fact, the government wanted to call Edward McDonald, the Head of the Strike Force in the Eastern District of New York, as a witness to testify to

the first ten paragraphs of the indictment which recited the prejudicial matters the grand jury was investigating, and defense counsel again objected, on the grounds that these matters were no longer relevant to the case because materiality had been waived. After the Court overruled the defense position, a stipulation was entered, although defense objections were preserved, stipulating that if McDonald were called to testify, he would testify to the material facts contained in paragraphs 1 through 10 of Count One of the indictment (A 65).

The grand jury testimony of Petitioner, Langella, on each of the three occasions he appeared before the grand jury was then received in evidence as Exhibits 1, 2 and 3, and the entire testimony was read in question and answer form to the trial jury, with one Assistant United States Attorney asking the questions and another Assistant United States Attorney assuming the witness stand and giving the answers that Langella had given in the grand jury (62-149).* Thus, in that recitation, the Assistant United States Attorney asking the questions was allowed to read to the trial jury what Petitioner had been told at the

* Numerical references are to Pages of the Trial Minutes

outset of his grand jury appearance, in that the grand jury was investigating the crimes of RICO, racketeering, narcotics, loansharking, etc., and all of the things that the defense had contended were not relevant at this trial (A 66). Petitioner was then asked questions with regard to other supposed organized crime figures who were not present at the meeting (A 67-70), and Petitioner testified that the purpose of the meeting was essentially to revive the Italian-American League. Petitioner said that he saw Carmine Persico, who was also known as "Junior" and that Junior was never downstairs, but that he saw him in the kitchen, and the two men went to the back patio (140-153). These were the questions and answers that were relevant to the grand jury investigation and which it was contended Petitioner lied about, but prior to these questions being asked, there were all sorts of questions asking Petitioner about whether he knew people in Florida and all sorts of business and criminal activities. He was asked whether he knew a Jerry Rosenberg, known as "Jerry the Jew". He was asked about trips to Las Vegas. He was asked about visiting Persico in prison in

Ashland, Kentucky, and he was asked about other things having nothing to do with the meeting at Vincent Regina's house (155-159). Petitioner said that there were nine people sitting around the table in the basement of Regina's house. Regina may have been there. Alphonse Persico, Carmine Persico's son, came downstairs and announced that his father was upstairs. Petitioner said he then went upstairs to tell Carmine Persico to leave (A 71-72). (Persico was prohibited by the terms of his parole from associating with some of the people who were in the basement.) Langella said that he saw Persico in the kitchen, then went out on the back patio, but then, all of a sudden, the cops appeared, made everyone freeze, and everyone was placed under arrest. The two men had just gotten together and were exchanging pleasantries when all hell broke loose. He exited the kitchen through the glass door and they were on the porch when the commotion started, but Langella was not sure whether or not they were actually in the kitchen or out on the porch (A 73-74). He said that the agents took everyone into the backyard. The F.B.I. all had their guns

drawn and everyone was placed against the wall (187-190). All of the people who had been in the basement came through the basement door (which was located under the patio), and they were also placed up against the wall (190). Langella said that Junior never came out through the basement door, never was in the basement, never sat at the head of the table and never participated in the meeting in the basement (A 75). That specific testimony was the entire basis of the perjury and also of the obstruction.

Langella said that he was in the house for about twenty minutes before Persico's son arrived (A 76), and the time was spent by all of the men downstairs in greeting each other and talking about the various maladies and ailments they all suffered from (202). All of a sudden, Persico's son came into the basement unexpected and unannounced (A 77). Langella said he had no idea why Carmine Persico was in the house, but he reiterated that Persico never attended the meeting.

The recitation of Petitioner's grand jury testimony was then completed, and F.B.I. Agent Raymond Becker took the witness stand (211). He

testified that on May 6, 1981 he was on surveillance looking for Alphonse Persico, the brother of Carmine Persico (213), because they had some information that Persico was going to be meeting with one, John Matera (214-215). The Court first sustained an objection to all of this surveillance and background testimony (A 78), but after the government continued to argue, it changed its mind, although still agreeing with defense counsel. The Court said it did not want to tell the prosecutor how to try his case, and because of that reason the testimony was allowed (A 79). The agent then talked about all of the evasive maneuvers by the vehicle in order to avoid being followed (A 79). Then, after they lost sight of the vehicle they went to 11th Avenue in Brooklyn to check the residences of Alphonse Persico and Carmine Perisco. They spotted the vehicle again parked on 11th Avenue and 77th Street, and observed three men coming down the street and talking to a heavy set man who had come out of 7713 11th Avenue, the house which the witness later learned was owned by Vincent Regina (225). Agent Becker went to the rear of the residence (227). He took up a vantage point behind the

house but his view of the whole residence was obstructed. There was a wall in the backyard about seven feet high, and the witness was located behind the wall, along with Marshal Mancini. In peering over the wall he could see the first two levels of the house, which included the patio, but he could not see the basement below, nor the steps coming from the basement (233-245). About ninety seconds after that he first heard footsteps and low voices on the patio directly beneath his vantage point, and when he tried to look, he saw some men sitting at a table but could not make out anyone (249). He saw someone coming out of the basement and then when he stood up, he immediately recognized Carmine Persico, Langella and Vincent Regina (A 80). He ordered the men to freeze and he also said that he had not seen anyone in the kitchen, on the porch or at the top of the stairs (252). Nine men came out of the basement and the witness identified them by name (A 81-82). All of the men were lined up against the wall, searched for weapons, and the house was searched for Alphonse Persico, the fugitive whom they were seeking from the beginning. Of course, Alphonse Persico was never found (254).

On cross examination, the agent again admitted that he could not see the whole house, nor could he see the gate in the rear of the house. He admitted that someone could have walked from the backyard, through the gate, and up on the patio (258). He also said that when he saw Carmine Persico, he was apparently on a eye level line with the gate (258), and the total number of men who were lined up against the wall was twelve not thirteen. Also, he had testified in the grand jury that the number of men had been thirteen (260-261). After being allowed to reread his grand jury minutes, he went back into the grand jury on a subsequent date and changed his testimony from thirteen men to twelve men. He then said that he testified on direct that when he stood up from behind the wall he saw the three men standing on the patio. He identified the men as Petitioner, Carmine Persico and Vincent Regina (268). The witness then admitted that he did not specifically see Carmine Persico come out of the house (335), and he also admitted that he had not been peering over the wall the entire time, so that there were periods when he lost complete sight of the rear of the house (351).

He did admit telling someone at Carmine Persico's parole hearing that Marshal Mancini had not been able to see anyone because he was too busy climbing the garage (358). Becker *did not* have very much time at the rear of the house to make observations.

The next witness was Kevin F. Mancini, who had been a Deputy United States Marshal at the time in question. He also described the surveillance that evening and also described the proceedings across the various backyards and alleyways with Becker to get to the back of Regina's house (429-430). He said that he could also see the first level on which the kitchen and dining room were located, but said that at various times his angle was cut off, so the kitchen was the only thing he could see (433-434). He, too, could see much of the house, but not the basement, and at a point he left the house to bring Agent Buckley back (440). He was looking down when he heard the clearing of throats and footsteps and saw the top of the heads of the three men, although he could not see into the basement level of the house (A 83). As he saw the heads of the three men, he heard the F.B.I. say,

"Freeze, Carmine", and he jumped off the garage roof (A 84). When he got down from the roof, he saw Persico, Langella and Regina with their hands on the wall, but in getting down from the garage he slipped and fell into the yard (A 84). He also said that he could not really identify anyone, but he went into the basement and ordered everyone there outside. He counted ten men (454). He then later found out there were nine men, yet he said that when they came out he was counting them and he counted ten men (454-455). When he finally got into the backyard he recognized Persico and Langella (457). After all the men came out of the basement and were in the backyard, Petitioner had to go to the bathroom and the witness took him back into the basement. Langella stopped at one of the chairs, picked up a pack of cigarette and a cigarette lighter and then proceeded to the bathroom. Then Langella went outside and a few minutes later they let Carmine Persico return to the basement. He sat down at the head of the table (463). As Persico was sitting in the chair, he reached over, picked

up a bottle of Scotch which was in front of him and poured a drink into a cordial glass (465). Persico then specifically made a statement to the effect that, "If I am going in I might as well have a drink" (465). He then allegedly made the statement about his guys being good but your guys are the best. We can't even have a sit (466). (That statement seems to be so improbable that it almost defies the imagination). The statement was offered for its truth and as evidence that Langella was lying when he said Persico had not been in the basement. An objection was overruled, and again, over objection, the witness was allowed to testify that within a month he put that statement in a report he drafted (468), but he admitted that he neglected to mention part of the statement when he testified in the grand jury (468-469).

Various defense objections were interposed concerning the testimony of what Persico allegedly said at the table in the basement, since he was not a defendant, and that the government should not be allowed to bolster the agent's testimony by bringing out grand jury testimony and prior reports (491-492).

A mistrial was asked for, but refused.

The witness was then confronted with his testimony in the Persico parole hearing, and admitted that he did not physically see anyone leave or enter the house from any exit whatsoever (494).

The next witness was Dennis Buckley, who also was behind the Regina home with Becker, and he testified that he saw Regina a part of the time in the kitchen area (495). He heard footsteps coming from underneath the wall where the patio was located and heard voices. When he looked up he saw two individuals coming toward him, Petitioner and Carmine Persico (597). Then Becker stood up and told Persico to freeze (599). There was a third individual behind him, whom he did not recognize. He, too, had been looking at the porch and had no view of the basement and never really saw anyone exit from that house (602-618).

There was a charge conference in chambers, and the defense wanted the Court not to read to the jury paragraphs 1 through 10 of Count One, on the grounds that these items were out of the case be-

cause materiality had been conceded (A 85), and if the jury requested a copy of the indictment that these ten paragraphs be excised. Naturally, the Court refused that request (A 86-89).

In the prosecutor's summation, he discussed all of the things with the jury that had been the subject of the numerous defense objections throughout the trial. He was allowed to tell the jury that the investigation concerned the Colombo Organized Crime Family, and that the jury was trying to find out which members of that group were engaged in racketeering, extortion, loansharking, narcotics, murder, etc. (A 92-93), and that the grand jury was investigating whether the Colombo Family and DeCavalanti Family were allegedly splitting up different territories involving narcotics and whether there were leadership problems involving the families (A 93).

During the Court's charge, it read the indictment in its entirety with all of the references to the Colombo Organized Crime Family and what the grand jury was investigating (A 96-98). The Court talked about investigations into the crimes of

narcotics, extortion, racketeering, loansharking, murder and leadership problems, the splitting up of territories, and the jury again became aware of all of these matters which were really not issues in the case because materiality had been conceded when the trial first started (A 96-98). The Court also read to the jury all of the questions and answers that had been contained in the indictment (A 99-108), and then told the jury that if they were satisfied as to the falsity of any one of the specifications contained in paragraphs 11 or 12 of Count One, they could convict Petitioner of perjury (866). Petitioner was convicted of both counts of the indictment as charged.

POINT I

THE COURT ERRED IN REFUSING TO GRANT PETITIONER'S MOTION TO DISMISS THE INDICTMENT ON THE GROUNDS OF PRE-INDICTMENT DELAY. ACTUAL PREJUDICE WAS SHOWN WHICH DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

As the record demonstrates, Petitioner, Langella, was called before a grand jury in the summer of 1981 which was investigating his presence at a meeting at the home of Vincent Regina on May 6, 1981. Vincent Regina testified before the grand jury on May 20th, June 6th and on August 17th, 1981, so that all of the facts were known to the grand jury upon which they based the instant indictment in August, 1981, yet the grand jury waited until July of 1984 to indict Petitioner for perjury and obstruction of justice, which indictment was unsealed on September 7, 1984. There was a three year delay, and it is most respectfully submitted that in this case no reason existed for the government to delay this indictment, except that they were investigating some other case in the Southern District of New York which had nothing to do with this one, and the delay caused actual prejudice to the Petitioner.

The prejudice was amply demonstrated and it is obvious and inescapable. The main question of fact in this case was whether or not Carmine Persico, who was apprehended in the backyard of Vincent Regina's house, had attended a meeting of various individuals which took place in the basement of that house. Mr. Regina's death on November 23, 1983, more than two years after the grand jury investigation, prevented Petitioner from calling Regina as a witness, and Persico's disappearance at the time this case went to trial prevented his being called as a witness. Had the indictment been voted promptly, Regina would have been around and Persico would have been available since he was then an inmate in a federal prison. The Court of Appeals deals with this question in three sentences and simply says that no prejudice resulted. Nothing could be more inaccurate. After all, the two witnesses were unavailable. One was dead and could not be resurrected to be asked what his testimony would be. The other, Persico, was unavailable and if he were present he certainly would have denied the preposterous statement attributed to him.

Regina's testimony would have clearly supported the grand jury testimony of Langella. We cannot refer specifically to the questions and answers involving Regina because the grand jury minutes have been sealed, but they will be handed up to this Court by the government if requested, and this Court can clearly see that Regina's testimony would have completely dovetailed with that of Langella. Thus, when the agents testified in substance that Langella and Persico came out of the basement of Regina's house, Regina's testimony that the men were really upstairs would have been added to that of Langella, so that the testimony supporting Petitioner would have been more evenly balanced with the testimony of witnesses called by the government. Persico would have also been available, and his absence during the trial of this case did not permit defense counsel to even make a proffer of proof based upon Persico's parole revocation hearing. It is reasonable to assume that he, too, would have given evidence favorable to the Petitioner.

The law has been well established that where pre-

trial delay resulted in undue prejudice an indictment must be dismissed. The Circuit Court in United States v. Finkelstein, 527 F.2d 517, 525-526, (2nd Cir. 1973), clearly followed this Court's decision in United States v. Marion, 404 U.S. 307 (1971), which held that regardless of any statute of limitation question, where pre-trial delay resulted in actual prejudice or where the delay was for the reason that the prosecutor wanted to obtain some technical advantage, then such a delay would violate the due process clause of the Constitution and would require dismissal of the indictment. The Second Circuit examined the situation in Finkelstein and found that there was no actual prejudice because the fact that a witness' recollection might be impaired or not as fresh if the indictment were voted earlier was not the type of actual prejudice required in Marion. See, also: United States v. Foddrell, 523 F.2d 86,87 (2nd Cir. 1975). Thus, there was no due process violation because there was neither a showing of actual prejudice or a showing that the government intentionally delayed filing the indictment to gain a tactical advantage.

In United States v. Marion, supra, this Court in the leading case analyzed the constitutional significance of avoiding pre-indictment delay, and held that if prejudicial delay had ensued, it would give a defendant a right apart from any speedy trial statute, and that the right afforded would be based on the due process clause of the Constitution. In United States v. Snyder, 668 F.2d 686 (2nd Cir. 1983), the standards enunciated in Marion, followed in United States v. Lovasco, 431 U.S. 783 (1977), were again discussed and adhered to. See, also: United States v. Elsberry, 602 F.2d 1054, 1059 (2nd Cir. 1979); United States v. Hodge, 556 F. Supp. 139, 141 (S.D.N.Y. 1983, Weinfeld, J.). Actual prejudice or a delay for improper reasons was still a requirement and also applied, in that if either condition was shown, Petitioner would be entitled to relief. The Circuit Court discussed the Snyder case again, strictly upon its analyzation of the facts, and it concluded that there was no prejudice save possibly a lack of recollections by certain witnesses during the trial, which did not seem to

be important. In any event, the dimming of memory strictly due to the passage of time is not normally considered to establish substantial prejudice. In the case at bar, the government delayed the filing of the indictment because it was investigating another case in the Southern District of New York which had nothing to do with the instant case. In the event that a three year delay to investigate that case caused substantial prejudice to the Petitioner, this Court should hold that the government took the risk that such a situation could happen and it must be saddled with the consequences of its own actions. The government in its reply affidavit (A 47-55), discussed the Southern District investigation, and it is most respectfully urged that an investigation into other people or even one involving the same defendant, involving other crimes in another jurisdiction, is no reason to impinge upon Petitioner's rights in the Eastern District. As we have mentioned before, the delay in indicting Petitioner was the only factor which prevented him from calling two key witnesses whose testimony might

have made the difference before the jury. Now that the case is over and one re-reads the reply affidavit of the government and one knows of the charges in the Southern District of New York which have now come down, one sees even less reason for the government to have delayed this indictment. The evidence that was utilized against Petitioner was complete in the summer of 1981, no tape recordings in other investigations were utilized at this trial, and it must be concluded that the reasons for the delay asserted by the government were unfounded. However, no reason, except in compelling circumstances, would justify the intentional delay and failure to investigate this case where actual prejudice was evident.

POINT II

PETITIONER WAS DENIED DUE PROCESS AND WAS HOPELESSLY PREJUDICED BY THE COURT ALLOWING THE JURY TO HEAR HIGHLY INFLAMMATORY AND PREJUDICIAL MATTERS WHERE MATERIALITY HAD BEEN CONCEDED AND NO VALID BASIS FOR THE INTRODUCTION OF SUCH EVIDENCE EXISTED.

The government always has the burden or proving materiality in a perjury or obstruction case, and the normal method of proof is to present evidence of the scope of the grand jury investigation by calling the foreperson or some other member of the grand jury as a witness, introducing the transcript of the grand jury proceedings or calling the Assistant United States Attorney who did the questioning as a witness at trial. The indictment itself is usually not proof of materiality. United States v. McComb, 744 F.2d 555 (7th Cir. 1984); United States v. Ostertag, 671 F.2d 262 (8th Cir. 1982); United States v. Picketts, 655 F.2d 837, cert. denied, 454 U.S. 1056 (7th Cir. 1981); United States v. Cosby, 601 F.2d 754 (5th Cir. 1979).

Materiality is an absolute necessity of this type of prosecution, and it must be capable of influencing

a grand jury on the issue before it rather than merely going to some limited or unimportant matter. United States v. Mancuso, 485 F.2d 275 (2nd Cir. 1973); United States v. Gugliano, 501 F.2d 68 (2nd Cir. 1974); United States v. Dudley, 581 F.2d 1193 (5th Cir. 1978). In addition, there are situations where the language used in an indictment is so prejudicial and inflammatory that the danger that it will have a spillover effect and prejudice the trial of a defendant on the issues is great, so that a Court should consider striking such language in any event. Thus, in United States v. Bonanno, 177 F.Supp. 106, 116 (S.D.N.Y. 1963), then District Judge Irving Kaufman, in considering the question of prejudicial language in an indictment, recognized that the danger to be protected against is that materially prejudicial and otherwise inadmissible language would be conveyed to a jury when the indictment was read, and a fair trial might be interrupted, especially where the language is not absolutely necessary to the indictment. In that case, the indictment contained prejudicial surplusage where it referred to racketeering and criminal syndicates with particular emphasis upon their activities in the

ladies garment trucking industry, labor management field and the narcotics traffic. United States v. Bonanno, supra, at 116.

In the case at bar, the prejudicial material is much greater because it is spread over some ten paragraphs of the indictment and the conclusion that the language was unnecessary is even greater because the Petitioner conceded materiality at the outset of the trial. Thus, defense counsel took the position that the jury should be advised that they need only consider the question of whether Langella was lying and not whether his lie was material to the grand jury investigation. In other words, the job that the jury would have would be much simpler than it is normally faced with of determining only if Langella lied and not how important his lie was to the grand jury or whether his activities prevented it from carrying its investigation further or in other regards doing its job. In that regard, defense counsel sought to simplify the issues and have the jury decide only the questions before it without a risk being present that its deliberations would be completely prejudiced

and affected by highly inflammatory material. One need only look at the first ten paragraphs of the indictment to see how prejudicial the testimony regarding the grand jury investigation into these matters could be to a jury trying to decide whether or not Petitioner was guilty. To talk about extortion, narcotics, RICO and all of these scandalous crimes, when all the trial jury would have had to do was to decide whether or not Langella was telling the truth, is highly inflammatory. To make matters worse, not only was materiality taken out of the case by the concession of counsel so that the jury did not need to hear this inflammatory material, but they heard it over and over again. It was read to the jury by the Trial Court in its charge, it was mentioned in summation by the prosecutor and it was mentioned in the prosecutor's opening. It was mentioned in the reading of the grand jury testimony of Langella, and the thread of all of these heinous crimes was woven into the fabric of the trial throughout its entire duration. Even the Trial Court obviously found that this material was highly prejudicial, because it remarked

during the prosecutor's opening that his statements sounded more like a summation (A 62-63), yet the Court declined to interfere with the prosecutor's handling of the case, even though the Court really knew that to try the case in that manner was not proper.

When the defense moved to strike the inflammatory material from the indictment, Rule 7(d) of the Federal Rules of Criminal Procedure clearly applied and should have prompted the Trial Court to grant the motion because the language would have to be considered surplusage where the allegations were not relative to the crime charged and were inflammatory and prejudicial. United States v. Napolitano, 552 F.Supp. 465 (S.D.N.Y. 1982). The same situation applies to the obstruction charge and the inflammatory language there, too, should not be made a part of the case where such language is not necessary to establish part of the governments burden or proof and was not an issue in the case. United States v. Archer, 335 F.Supp. 981, 989, rev. on other grounds, 486 F.2d 670 (S.D.N.Y. 1983) (2nd Cir. 1983); United States v. Bonanno, supra. Here the prejudice of including the language in these allegations

had the potential for overshadowing the entire case, since the trial jury might very well have placed a greater emphasis upon the inflammatory material of the crimes referred to than on the single issue of whether or not Petitioner committed perjury. United States v. Wilson, 565 F.Supp. 1415 (S.D.N.Y. 1983).

In this case, the inflammatory material of the first ten paragraphs of the indictment was enhanced and compounded by the fact that the language was referred to not once but many different times throughout the conduct of the entire trial. It would seem that Langella was not being tried for perjury or obstruction of justice, but was being put on trial for his alleged connections to organized crime or his association with various people who were his friends and acquaintances.

It should be noted that when the Court charged the jury, it specifically charged that materiality was not an issue in the case and should not concern the jury (A 109). The Court told the jury that it decided as a matter of law that the questions were material, so that it is hard to see what purpose all

of the inflammatory material served except to prejudice the jury and insure that Petitioner would be convicted.

POINT III

THE TRIAL COURT SHOULD HAVE REQUIRED THE GOVERNMENT TO ELECT BETWEEN THE TWO COUNTS OF THIS INDICTMENT. AT THE VERY LEAST, BOTH COUNTS SHOULD NOT BE ALLOWED TO STAND AND THE CONSECUTIVE SENTENCES IMPOSED ON BOTH COUNTS ARE IMPROPER.

This indictment contained two counts, the first one lodged in terms of perjury and the second charging Petitioner with obstruction of justice based upon the same alleged lies charged in Count One. Petitioner did not give any equivocal or evasive answers, but an examination of the record shows, rather, that his answers were direct and unequivocal, in that he specifically testified that he and Carmine Persico had not been in the basement of Vincent Regina's house. Obstruction charges have normally been concerned with evasive answers, as was recognized in United States v. Cohn, 452 F.2d 881 (2nd Cir. 1971), and it usually involves conduct which seeks to obstruct or impede a grand jury from pursuing its function. In United States v. Alo, 439 F.2d 751, cert. denied, 404 U.S. 850 (2nd Cir. 1971), the Circuit Court appreciated the difference between perjury and obstruction of justice, in that obstruction dealt with the deliber-

ate frustration of an agency attempting to gather relevant evidence through the use of corrupt or false means, such as the utilization of a blatantly evasive answer or a witness feigning forgetfulness or destroying evidence or influencing someone to absent himself. Essentially perjury is a lie and obstruction is something more. Thus, where only a falsehood is involved and answers are not evasive, only a perjury should be charged. It has been held that a single lie merits but a single punishment. United States v. Bernardi, 629 F.2d 723,729 (2nd Cir. 1980).

The "concealment of knowledge" or utilization of something more than a mere perjury has always been the standard applied to civil contempt cases, and we suggest is the basis of the obstruction charge, because obstruction is basically a contempt statute rather than a statute dealing with perjury. See, Matter of Kitchen, 706 F.2d 1266 (2nd Cir. 1983); In re Weiss, 703 F.2d 653 (2nd Cir. 1983); United States v. Essex, 407 F.2d 214 (6th Cir. 1969). Thus, in Kitchen, it was held that when a witness answered "No" to a question it could not be deemed to be a "false and evasive answer" as a matter of law,

and while the answer could be perjury, it could not be contempt. Matter of Kitchen, supra, at 278.

The case at bar involved a situation wherein Petitioner was charged with lying when he said Carmine Persico was not in the basement with him and that the two men exited from the kitchen or patio of Vincent Regina's house. There is no hint at or allegation of Petitioner having told anyone else to lie, having destroyed evidence or having done anything else which would corruptly interfere with or impede the grand jury investigation. This case, on its facts, was either a perjury or it was not. Petitioner should never have been charged with obstruction, or having been once charged, the government should have been forced to elect between the two counts of this indictment, which was multiplicitous. The element of corrupt intent, which is present in the obstruction count but not in the perjury count, implies a different type of conduct than a mere lie. The facts in this case were nothing but a false statement, even assuming that Langella was not telling the truth in the grand jury.

For the government to prove obstruction of justice in the instant case, it had to first prove every element of the perjury count. The obstruction of justice count is based solely on the Petitioner's alleged perjury; therefore, proof of the perjury count does not require proof of any additional fact needed to prove the obstruction of justice count. In effect, this indictment treated perjury as a lesser included offense of the obstruction of justice. Accordingly, the two counts are multiplicitous, and the government should have been required to elect to prosecute one or the other.

Charges are multiplicitous when they allege more than one way in which a defendant has committed only one offense. To determine whether charges are multiplicitous, Courts have consistently depended on the rule in Blockburger v. United States, 284 U.S. 299 (1931).* Multiplicity is against the double jeopardy

*The Blockburger rule, most recently reaffirmed by this Court in Missouri v. Hunter, 459 U.S. 359 (1983), is that:
Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. Blockburger, 284 U.S. at 304

clause of the Fifth Amendment because "it may lead to multiple sentences for the same offense and may improperly prejudice a jury by suggesting that a defendant has committed not one but several crimes." United States v. Reed, 639 F.2d 896, 904 (2nd Cir. 1981).

In Missouri v. Hunter, 459 U.S. 359 (1983), this Court ruled that Blockburger would not apply to statutes wherein the legislature intended to impose cumulative punishments for violation of separate statutes based on the same transaction. In that case, the Court, in allowing the cumulative sentence, held that since Blockburger is "a rule of statutory construction and because it serves as a means of discerning congressional purpose", 459 U.S. at 362, the Blockburger rule will not apply to situations where Congressional intent is apparent. Thus, according to United States v. Wilson, supra, when looking to whether or not multiple punishment should be permitted for conduct violating two or more criminal statutes, "(t)he starring point is the language of the statutory programs (and) legislative history of the statutes."

It is obvious from the faces of the statutes involved in Hunter that they were intended to be punishable by cumulative sentences. In Hunter, the two violations involved were armed robbery and an offense titled "Armed Criminal Action", Mo. Ann. Stat. Section 559.22 (Vernon 1979). The offense of "Armed Criminal Action" is said to be committed by anyone convicted of a felony using a dangerous or deadly weapon. The body of that statute specifically states that, "(t)he punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the (original) crime committed ...". Hunter, 459 U.S. at 370.

Clearly, the Missouri legislature intended the punishment for armed criminal conduct to be imposed over and above any penalty imposed for the underlying felony. The perjury statute involved in the case at bar, in contrast, contains no provision for cumulative punishment at all. Rather, 18 U.S.C. Section 1623, enacted as Title IV of the Organized Crime Control Act of 1970, was passed to eliminate the "two-witness" rule in perjury prosecutions. Title IV was not aimed at imposing any multiple punishments for

testifying falsely, but was instead intended to ease the requirements for prosecuting perjury. See H.R. Rep. No. H521-28, H523-40, S. Rep. 91-617 (1970).

It is also apparent that 18 U.S.C. Section 1503 does not ask for any sort of multiple punishment. Section 1503 was enacted to be declaratory of the law concerning contempts of court and to protect witnesses in federal courts. United States v. Essex, supra. Since Section 1503 was passed in 1947, it could not have possibly intended cumulative punishments in conjunction with Section 1623, which was passed in 1970. Since there is no legislative intent to the contrary under Section 1503 or Section 1623, the Blockburger rule of statutory construction applies in this case.

Applying the Blockburger test to the case at bar, the counts against the Petitioner are multiplicitous. Accordingly, the Petitioner may be found guilty of one or the other, but not both. It is quite clear the proof of the false declaration requires nothing which is not required in proof of the obstruction count.

Indeed, the structure of the indictment points unequivocally to the fact that the government obligated itself to prove two things: (1) the Petitioner made false material declarations before a grand jury, and (2) these false material declarations obstructed justice. Therefore, under Blockburger, the indictment against Gennaro Langella is multiplicitous. The indictment does not treat obstruction of justice and perjury as two distinct crimes, but, rather, treats perjury as a lesser included offense of obstruction of justice, in that everything in the perjury count is also in the obstruction count. Since perjury is viewed as a lesser included offense of obstruction of justice for the purpose of this indictment, the government should have had to elect to prosecute one count or the other. Lesser included offenses belong in jury instructions, not indictments.

Viewing perjury as a lesser included offense of obstruction of justice is not new to the law. In United States v. Hubbard, 474 F.Supp. 90 (D.C. Cir. 1979), aff'd. 558 F.2d 1238 (D.C. Cir.), cert. denied, 456 U.S. 926 (1982), the Court agreed with the defen-

dant's contention that perjury should be treated as a lesser included offense of obstruction of justice when the obstruction is based on the perjury. The reason for this is that there is no fact or element to be proved in the obstruction of justice count which is not also included in the perjury count. Since the obstruction of justice statute contains an omnibus clause which punishes anything that "influences, obstructs, or impedes, or endeavors to influence, obstuct, or impede, the due administration of justice", the statute should be read loosely to encompass elements of other offenses.

The notion that perjury should be treated as a lesser included offense of obstruction of justice is also emphasized by the case of In re Michael, 326 U.S. 244 (1945). In Michael, this Court declared in no uncertain terms that false swearing before a grand jury cannot alone amount to an obstruction of justice. In that case, the Court ruled that, "perjury alone does not constitute an obstruction ... There must be added to the essential elements of perjury ...the further element of obstruction to the court in the performance of its duty." Michael, 326 U.S.

at 228. See, also: Ex Parte Hudgings, 249 U.S. 378, 382-384 (1919).

Thus, to prove obstruction of justice in this case, the government should have had to prove all of the facts and elements of the perjury count, plus the additional fact that the Petitioner's conduct impeded justice. This point is most clearly illustrated by United States v. Griffin, 589 F.2d 200 (5th Cir), cert. denied, 444 U.S. 825 (1979). In Griffin, the question before the Court was "whether perjury by a witness can constitute obstruction of justice punishable under 18 U.S.C. Section 1503". Id. at 201. The Griffin Court ruled that proof of perjury could be used as proof of obstruction of justice so long as "added to the element of perjury there is the further element of obstruction to the Court". Id. at 205.

It is obvious both Michael and Griffin stand for the proposition that, whether an indictment alleging false swearing if couched in terms of obstruction of justice, or perjury, or both, "a single lie merits but a single punishment". United States v. Bernardi, supra. Both cases treat perjury as a lesser included

included offense of obstruction of justice and would not allow cumulative punishment for them.

Since the two counts in the Langella indictment are multiplicitous, the government should have been required to elect one or the other before the indictment reached the jury, and consecutive sentences for both convictions of both counts should not be allowed to stand. In addition, when one really carefully examines the facts adduced, it is inescapable that the perjury was not even proved. The truth of the matter is that the government never proved Carmine Persico was in the basement. No one actually saw him there and since that was the gravamen of the alleged perjury, the conviction should not stand as a matter of law.

CONCLUSION

THE PETITION OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—August Term 1985

Argued: August 27, 1985 Decided: November 1, 1985

Docket No. 85-1103

UNITED STATES OF AMERICA,

Appellee,

—against—

GENNARO LANGELLA,

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge*,
KEARSE and CARDAMONE, *Circuit Judges*.

Appeal from judgment of conviction of obstruction of justice, 18 U.S.C. § 1503, and of making false declarations before a grand jury, 18 U.S.C. § 1623, in the United

States District Court for the Eastern District of New York, Henry Bramwell, J.

Affirmed.

STANLEY M. MEYER, New York, NY, (DePetris, Meyer & Diesenhouse, Esqs.,) *for Defendant-Appellant.*

DOUGLAS ERIC GROVER, Brooklyn, NY, Special Attorney for the United States Department of Justice, Organized Crime Strike Force, Eastern District of New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, Edward A. McDonald, Attorney-in-Charge, United States Department of Justice, Organized Crime Strike Force, Eastern District of New York, of Counsel), *for Appellee.*

FEINBERG, *Chief Judge:*

Gennaro Langella appeals from his conviction of obstruction of justice, 18 U.S.C. § 1503, and of making false declarations before a grand jury, 18 U.S.C. § 1623, after a jury trial in the United States District Court for the Eastern District of New York before Judge Henry Bramwell. Langella received a sentence of two consecutive five-year prison terms and a fine of $15,000. He

argues to us, among other things, that certain inflammatory material should have been stricken from the indictment and that the imposition of consecutive sentences on the facts of this case constitutes multiple punishment for the same offense in violation of the rule of Blockburger v. United States, 284 U.S. 299 (1932). We conclude that appellant was not punished twice for the same offense and that the failure to strike portions of the indictment was not reversible error. The judgment of conviction is affirmed.

I.

According to the indictment in this case, in the summer of 1981, a grand jury in the Eastern District was investigating alleged racketeering and other criminal activities of the Colombo organized crime family. In particular, the grand jury was seeking to determine whether there was a meeting between the Colombo and DeCavalcante organized crime groups on May 6, 1981 at the Brooklyn home of Vincent Regina and, if so, who had attended it. Agents of the Federal Bureau of Investigation and the United States Marshal's Service had interrupted a meeting at Regina's house on that day, and had discovered appellant Langella on the premises.

Langella was called before the grand jury three times to answer questions concerning the meeting, the Colombo family and his relationship to various individuals suspected of being members of organized crime groups. He appeared before the grand jury twice in July and once in August, 1981. On July 8, the date of his first appearance, he denied knowing that anyone he knew was a member of the Colombo family and claimed not to know how he had

met two individuals who had been present at the May 6 gathering. Langella also stated that he had been without work for twelve years due to health problems, and that he did not know what Carmine Persico, his friend of thirty years, did for a living. On July 17, Langella stated to the grand jury that the purpose of the meeting had been to revive the Italian-American Civil Rights League, and that no business of substance had been transacted during the thirty minutes that the meeting had been in progress prior to its interruption. He also stated that although Carmine Persico had been present in the house where the meeting took place, Persico had remained upstairs and had never attended the meeting, which was held in the basement. On August 7, Langella reaffirmed that Persico had been upstairs and had not participated in the May 6 meeting in any way.

In September 1984, Langella was indicted in a two-count indictment charging him with making false statements to the grand jury during his 1981 appearances and with obstruction of justice. The introductory paragraphs of both counts, which we will refer to for convenience as the perjury count and the obstruction of justice count, described the subjects of the grand jury investigation as the loansharking, extortion, murder and narcotics distribution activities of the Colombo organized crime family. As part of the investigation, the indictment continued, the grand jury sought to determine who had been present at the May 6, 1981 meeting held at Regina's house and what had occurred there. Each count went on to state that the grand jury had heard evidence that the purpose of the meeting had been for the Colombo and DeCavalcante crime groups to discuss the possibility of an alliance and to divide territories for the distribution of narcotics.

The first count of the indictment then recited excerpts from Langella's grand jury testimony of July 17 and August 7, 1981, where he repeatedly stated that Persico had not attended the meeting. That count charged Langella with violating 18 U.S.C. § 1623 by lying to the grand jury on these occasions. The second count of the indictment repeated the background information contained in the first count, and accused Langella of obstructing justice under 18 U.S.C. § 1503 by testifying falsely and concealing evidence from the grand jury in all three of his appearances before it.

At the outset of trial, Langella conceded that his statements to the grand jury quoted in the perjury count had been material to the grand jury's investigation. He then moved to strike the paragraphs of the indictment that contained background information ("the background paragraphs"), claiming they were inflammatory and irrelevant to the charges. Judge Bramwell denied the motion. At trial, the government offered to produce a witness willing to testify as to the information in the background paragraphs. Langella argued that this evidence should not be admitted, but Judge Bramwell ruled that the evidence could go to the jury. The government and Langella then stipulated that if the witness appeared, he would testify as to the matters described in the disputed paragraphs.

At trial, the government relied primarily on the transcripts of Langella's three grand jury appearances in 1981 and the testimony of the federal agents who had interrupted the Brooklyn gathering. The agents' testimony provided circumstantial evidence, directly contradicting appellant's answers to the grand jury, which indicated that Carmine Persico had been in the basement of Re-

gina's house at the time the agents emerged to stop the meeting. After deliberation, the jury found Langella guilty on both counts. Judge Bramwell then sentenced him to consecutive terms of five years in prison on the perjury count and five years on the obstruction of justice count, and fined him $10,000 on the former count and $5,000 on the latter.

II.

Appellant contends that the background paragraphs should have been stricken from the indictment as irrelevant and prejudicial. To establish that Langella violated 18 U.S.C. § 1623, he argues, the government had only to show deliberate falsehoods concerning matters material to the grand jury's investigation. Because Langella conceded that his statements to the grand jury had been material, the only element missing in the prosecution's perjury case was proof that Langella had lied. Accordingly, he claims, the description of the subjects of the grand jury inquiry and mention of evidence that the Brooklyn meeting had been a conference of organized crime clans were irrelevant to the crime charged. Since these matters were also highly prejudicial in the eyes of the jury, he urges, the trial judge seriously erred in refusing to strike the background paragraphs from the perjury count. For similar reasons, he argues that the disputed paragraphs should also have been stricken from the obstruction of justice count.

The government responds that the background paragraphs were necessary on the perjury count to show that Langella had the specific intention to lie before the grand jury. With regard to the obstruction of justice count, the

government adds, the disputed paragraphs were also needed to inform the jury of the scope and nature of the grand jury's investigation.

We agree with the government that the background paragraphs were relevant to the obstruction of justice count, and that refusal to strike them was therefore proper. We need not decide, however, whether the background paragraphs were also relevant to the offense of perjury once Langella had conceded materiality. Even assuming that this material was both prejudicial to appellant and no longer necessary to show materiality on the perjury charge, any prejudice to Langella could have been remedied by an instruction to the jury to disregard the material in considering the perjury issue. There is no indication in the record that Langella requested such a limiting instruction. Instead, Langella took the position that the background paragraphs should be stricken completely. Accordingly, the trial judge did not commit reversible error in denying appellant's motion to strike.

Appellant also claims that he should never have been charged with obstruction of justice. He reasons that all the government proved here was that Langella made false statements to the grand jury, and proof of such false testimony alone will not support a conviction for obtruction of justice under 18 U.S.C. § 1503. We find no merit to this claim. The obstruction count of the indictment did not charge Langella only with making false statements. It also accused him of concealing evidence concerning Carmine Persico and the Brooklyn meeting. Several of Langella's answers on these topics were obviously evasive and constituted concealment of evidence. That the false testimony concerning Persico's presence was also a lie did not remove it from the scope of Section 1503. See United

States v. Cohn, 452 F.2d 881, 883-84 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972).

III.

The trial judge imposed consecutive sentences on the perjury and obstruction of justice counts. Langella argues that his conviction for obstruction of justice was based upon the same grand jury testimony as his perjury conviction, and that therefore he received punishment twice for one offense in violation of the rule of Blockburger v. United States, 284 U.S. 299 (1932). The *Blockburger* rule is a principle of statutory construction used to determine whether Congress has provided that two statutory offenses may be punished separately. Whalen v. United States, 445 U.S. 684, 691 (1980), cited in Albernaz v. United States, 450 U.S. 333, 337 (1981). The rule provides that

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger, supra, 284 U.S. at 304. Consecutive punishments should not be imposed for violations of separate statutes when only one "offense" has been committed under *Blockburger*, absent a clearly expressed legislative intent to the contrary.

The conduct made criminal by 18 U.S.C. § 1623 is the making of a false material statement before a grand jury. Langella asserts that on the count charging violation of 18 U.S.C. § 1503 the government had to prove that he had

made false material statements before a grand jury and that his declarations had obstructed justice. Accordingly, he claims, the government had to prove every element of its perjury case in order to prove obstruction of justice, and therefore, perjury and obstruction under these circumstances collapse into a single "offense" under *Blockburger.*

The government denies that appellant's two convictions stem from the same conduct. Rather, it argues, the conviction under 18 U.S.C. § 1623 was based only on statements Langella made before the grand jury on July 17 and August 7, 1981, to the effect that Persico had not attended the meeting. On the other hand, appellant's responses on July 8, and in his two later appearances, dealing with the meeting as well as with Persico's whereabouts, provided the basis for the obstruction charge under 18 U.S.C. § 1503. Hence, each conviction involves a distinct set of "act[s] or transaction[s]" and the *Blockburger* rule does not apply.

We need not address the issues thus framed, because Langella's argument based on *Blockburger* would fail even if both convictions were founded on identical conduct. In *Albernaz*, the Supreme Court noted that

> application of the [*Blockburger*] test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof required to establish the crimes.

Albernaz, supra, 450 U.S. at 338, quoting Ianelli v. United States, 420 U.S. 770, 785 n.77 (1975). *Albernaz* requires us to focus on the provisions of the statutes involved, rather than on the evidence adduced at trial, to

determine whether the punishment appellant received was proper under *Blockburger*. See, e.g., United States v. Barton, 647 F.2d 224, 235-38 (2d Cir.), cert. denied, 454 U.S. 857 (1981).

Comparison of the statutory provisions at issue here establishes that perjury and obstruction of justice are distinct offenses under the *Blockburger* analysis. The definitions of perjury and of obstruction of justice each require proof of elements that the other does not. To show perjury, the government must demonstrate the falsity and materiality of a witness' statements. 18 U.S.C. § 1623. Neither element is needed to prove obstruction of justice under 18 U.S.C. § 1503. Under that section, the government need only establish that a witness has deliberately attempted to frustrate a grand jury's investigation, see United States v. Alo, 439 F.2d 751, 754 & n.4 (2d Cir.), cert. denied, 404 U.S. 850 (1971), not that the statements made were false or material. Conversely, to convict under section 1623, the government need not prove that a defendant has obstructed the administration of justice. As each offense requires proof of an element that the other does not, imposition of consecutive sentences for perjury and for obstruction of justice does not run afoul of the principle stated in *Blockburger*. See United States v. Bridges, 717 F.2d 1444, 1448-51 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1310 (1984).

IV.

Appellant also contends that the indictment should have been dismissed because of pre-indictment delay, and that the trial judge should have recused himself because of bias. Neither argument has merit. To prevail on his

claim that pre-indictment delay violated his due process rights, Langella must prove both that the delay resulted in actual prejudice and that the government's reasons for the delay were improper. United States v. Lovasco, 431 U.S. 783, 790 (1977). No such showing was made. To the contrary, the record indicates that the delay was due to the government's need to preserve evidence and maintain secrecy in a related investigation in the Southern District of New York. Nor was Judge Bramwell required to recuse himself. Information possessed by a judge must stem from an extrajudicial source to warrant disqualification. United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982). Appellant objects to Judge Bramwell's consideration of a newspaper article describing Langella as part of the Colombo organized crime family during a proceeding to set bail. However, during that proceeding the prosecutor justifiably told the judge about a pending indictment in the Southern District and what it indicated about Langella. Thus, the judge's knowledge of Langella's position in the underworld did not come from an extrajudicial source.

The judgment of conviction is affirmed.